U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 August 2007

CASE NOS.: 2006-LHC-01377 and 2007-LHC-00303

OWCP NOS.: 14-144974 and 14-146777

In the Matter of:

R.T.,
Claimant,

v.

Todd Pacific Shipyards,
Employer,

Liberty Northwest Insurance Co.,
Carrier.

Appearances: Mike Cokins, Esq.
For Claimant

Russell A. Metz, Esq.
For Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for compensation brought pursuant to the Longshore and Harbor Workers' Compensation Act, as amended ("the Act"). 33 U.S.C. § 901 *et seq*. The Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This is a consolidated case, brought by Claimant against Todd Pacific Shipyards and its insurance carrier, Liberty Northwest Insurance Corp. (collectively, "Employer"), involving claims for two separate injuries. First, Claimant alleges he was exposed to toxic paint sometime between October 28, 2005 and November 8, 2005 ("the paint exposure injury"). Second, he alleges that he was hit in the head with a large chainfall on November 8, 2005 ("the chainfall injury"). Claimant posits that these events brought on disabling, chronic symptoms of vertigo, head pain, depression, hearing impairment, and memory loss as well as other cognitive difficulties.

The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for hearing on December 4, 2006. The Notice of Hearing was issued on May 18, 2006. On December 4, 2006, the undersigned convened the formal hearing in Houston, Texas. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted into evidence. Administrative Law Judge exhibits ("AX" 1-6) were admitted without objection. *See* hearing transcript ("TR") at 12-13. Claimant's exhibits ("CX") 1, 2, 4-6, and 8-20 were admitted, with CX 19 and 20 admitted over Employer's objection.[1] *See* TR at 16. All of Employer's exhibits were admitted without objection as EX 1-11. *See* TR at 17-18. Testifying on Claimant's behalf were Claimant's at-home caregiver, Barbara Armstrong, as well as Claimant himself. Employer's medical expert, Dr. Martin Steiner, testified on Employer's behalf. Following the hearing, Employer submitted and the undersigned accepts into evidence the post-hearing deposition of Patricia Sparks (EX 12). Employer also submitted after the hearing two affidavits from Peter Judt, the Production Supervisor/Coating Specialist for Todd Shipyards, which were admitted over Claimant's objection (EX 13) for the reasons set forth below.

Both parties submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and consideration of the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. At the time that Claimant alleges the injuries occurred, there existed an employer/employee relationship between Employer and Claimant.
2. The Act applies to the claim, which was timely filed and noticed.
3. On November 8, 2005, Claimant was injured while working with a chainfall that hit him in the head,
4. Claimant was entitled to medical treatment for the chainfall injury, through and including November 21, 2005, and
5. Claimant's average weekly wage was $851.66, resulting in a compensation rate of $567.77.

TR at 5, 9-10.

ISSUES

1. Whether Claimant was exposed to toxic paint,
2. Whether such exposure caused injury,

[1] CX 3 was listed by Claimant as an LS-202 for the paint exposure incident. However, it was never submitted into evidence. CX 7 was listed as an LS-18, but Employer admitted it was never filed and did not exist. Claimant's counsel withdrew CX 7 from the record.

3. Extent of injury, if Claimant was injured by exposure to paint,
4. Extent of Claimant's other injury from the chainfall accident,
5. Entitlement to medical benefits beyond November 21, 2005, and
6. Interest and penalties, if any.

TR at 5, 9-11.

FINDINGS OF FACT

Background

Claimant, a 47-year-old man, brought this claim for compensation and medical benefits against Employer for injuries from two separate incidents sustained by Claimant while working for Employer.

Claimant is certified as a boilermaker and pipefitter, and has worked at a variety of jobs throughout his life. TR at 34-35. He obtained a Bachelor of Arts in Mechanical Engineering in 2000 and has earned certifications in firefighting, marine firefighting and survival training. *Id*. at 37. Todd Pacific Shipyards hired him as a boilermaker in 2001. *Id*. at 41. Some of Claimant's work with Todd Shipyards included working at heights. *Id*. at 41-45. He often climbed up on platforms or to the top of ships that were twenty stories tall. *Id*. The job also involved moving heavy objects, including bulkhead metal sheeting and engines, which required the use of heavy chainfalls weighing up to 500 pounds. *Id*. at 41-42.

With regard to the first of the alleged injuries, Claimant testified that he is uncertain about the exact date of the alleged toxic paint exposure incident, but he thinks it occurred sometime between October 28, 2005 and November 7, 2005, on a Saturday sometime prior to the date of the chainfall accident, which occurred on November 8, 2005. *Id*. at 48, 106 118, 121. He testified that the paint exposure occurred while he was working as a rigger, holding a paint basket containing another employee who was spraying paint on the vessel. *Id*. at 48-49. The wind blew powerfully, according to Claimant, to the point that he was sprayed with enough gray paint to make his "clothes tacky." *Id*. at 48-49, 51. He testified that his face and a little part of his neck were exposed to the paint. *Id*. at 106. He then went to the men's locker room to clean up with soap and hot water. *Id*. at 51. He continued working that day and felt no immediate ill effects from the exposure, but he experienced flu-like symptoms the following day. *Id*. at 53-55.

With regard to the second alleged injury, Claimant testified that on November 8, 2005, he was working on a Coast Guard vessel using chainfalls to remove auxiliary engines when a chain was dropped inadvertently and hit him. *Id*. at 55; CX 19 at 1. He reported that he anticipated the chain's impact and moved quickly, at which point his protective helmet was dislodged and he was then struck in the head without protective gear. CX 19 at 1. The 3- or 4-ton chainfall struck him on the right temple. TR at 56, 58-59. He reports that he was knocked to his knees but does not remember losing consciousness. *Id*. at 59; CX 19 at 1. He then crawled to safety and remembers seeing with tunnel vision. TR at 59-60; CX 19 at 1. He experienced severe nausea as well as throbbing pain on the right temple extending to the scalp region. CX 19 at 2. The center of his right temple swelled to the size of a golf ball; it protruded so much that he could not

fit a hard hat on his head. TR at 61; CX 8 at 10; CX 19 at 2. He notified his supervisor of the injury and was examined by a medic, and despite feeling disoriented and tired he continued to work that day and the next. TR at 62-64; CX 4; CX 19 at 2.

Claimant testified that since the accident he has had short term memory loss, altered smell and taste, confusional states, right ear tinnitus, depression, diminished weight and strength, and difficulties with concentration and attention. TR 65-66; EX 19 at 2. He reportedly developed positional vertigo which has been ongoing; when the vertigo is particularly intense, it is accompanied by nausea and vomiting. EX 19 at 2. He stated that he had a hearing test with normal results prior to the injury and noticed a subsequent loss in hearing in the right ear after the chainfall accident. *Id*.

On November 10, 2005, Claimant sought out medical attention, but the medical clinic was closed. TR at 65. On November 11, he was seen by a doctor and given a CT scan. *Id*. The CT scan did not show significant head trauma but indicated a possible fusiform aneurysm thought to be not necessarily related to the accident or the symptoms, but this has not been further evaluated. CX 8 at 4; CX 11 at 1-2; CX 19 at 2. Claimant saw a physician again on November 21, 2005. CX 8 at 8. His symptoms had diminished some. *Id*. Claimant's treating physician, Dr. Thomas Buchanan, noted Claimant's complaints of memory loss, vertigo, and head pain. *Id*. He ordered additional blood tests and scheduled a follow-up appointment, but released Claimant to return to work. EX 5 at 11; CX 8 at 10. Dr. Buchanan checked a series of boxes on a form in his notes, one of which reflected no report of toxic exposure. EX 5 at 12.

Dr. Buchanan saw Claimant again on November 28, 2005 and December 09, 2005. CX 8 at 1-2, 8. During Claimant's follow-up appointment on November 28, 2005, Dr. Buchanan documented that Claimant's platelet count had dropped from 149,000 to 108,000. CX 8 at 4. The first of these two figures is not dated, but the second was obtained from blood tests on November 21, 2005. *Id*. Claimant continued to report that he felt flu-like symptoms and vertigo. *Id*. It was at this appointment, on November 28, 2005, that Claimant first mentioned to Dr. Buchanan his exposure to paint. CX 8 at 4; TR at 68. Dr. Buchanan asked Claimant to obtain from Employer (and provide to Dr. Buchanan) a Material Safety Data Sheet ("MSDS") for the paint, which is a document that lists the toxic substances present in workplace materials and the possible effects of exposure. TR at 68-69; CX 12 at 1-5, 7.

On November 29, 2005, Employer controverted the claim based on the chainfall accident and refused to pay for additional treatment. EX 5 at 1. Claimant testified that after Employer controverted the chainfall claim, he reported to Employer that he was exposed to paint while working on the ship "Dry Dock 10." TR at 69-70. It was at this point that Claimant asked for and received the MSDS form for the paint "Interlac 2 Haze Gray." TR at 70-71; CX 12. Claimant provided the MSDS to Dr. Buchanan. CX 8 at 3. Claimant cites the MSDS itself, which indicates Interlac 2 Haze Gray contained a chemical called "1, 2, 4 – Trimethylbenzene," a toxin that can affect the brain and cause dizziness, headaches, or nausea; the MSDS also notes that "repeated and prolonged occupational overexposure to solvents could cause permanent brain and nervous system damage." CX 12 at 3, 5, 7.

Dr. Buchanan reviewed the MSDS and ordered additional blood tests which showed that Claimant's platelet count remained low at 113,000. CX 8 at 10; CX 10 at 2. He also reviewed Claimant's CT scan report. CX 12, CX 8 at 4. Dr. Buchanan saw Claimant on December 9, 2005. *Id*. at 1. Claimant reported that his vertigo had improved some. *Id*. Based on Dr. Buchanan's evaluation of Claimant, his history, and the lowered platelet levels, Dr. Buchanan determined that it was "more probable than not" that Claimant's condition was caused by "his exposure to toxic paint." CX 8 at 3. He authorized Claimant's work release with the following work restrictions: no overhead work, limited stooping and bending, limited lifting, pulling and pushing up to 10 pounds, and no exposure to paint or paint products. *Id*. at 1. Dr. Buchanan also referred Claimant to a neurologist for further treatment. *Id*. However, Claimant testified that he never made it to the appointment with the neurologist as he could not work and did not have the money he needed to stay in Seattle. TR 72-74. Without compensation and medical benefits, Claimant was forced to return to Texas to reside with his son in mid-December of 2005. *Id.* Claimant testified that his symptoms of headaches, dizziness, vertigo, short-term memory loss, hearing impairment, mood swings, and depression persisted through the spring and fall of 2006. TR at 76; CX 9 at 1-3; CX 19 at 2-4. For a brief period of time in spring of 2006, Claimant was homeless, destitute, and carried his belongings in a suitcase. TR at 76-77.

Claimant was unable to obtain additional medical care for his condition until May 2006, because Employer denied coverage and Claimant's private health insurance would not cover work-related injuries. TR at 79, 129-130. Soon thereafter, Claimant met Barbara Armstrong, who took him into her home. *Id*. at 78. She contacted his group health insurance in an attempt to obtain treatment for Claimant. *Id*. at 129-130. She testified that Claimant's insurance company told her that Claimant could not obtain coverage for treatment of injuries sustained in the workplace. *Id*. Since Claimant was not covered and had no money to pay for medical treatment, Ms. Armstrong helped him find some limited treatment at a public clinic, St. Vincent's Clinic, in Galveston, Texas. *Id*. at 79, 130-131.

Claimant provided the medical staff at St. Vincent's Clinic with records of his injury and prior treatment. *Id.* at 81. Claimant's treating neurologist at the clinic performed a mental status examination and diagnosed Claimant with memory impairment and post-concussive syndrome, a condition with symptoms that include headaches, memory loss, light-headedness, dizziness and unsteadiness. TR at 132, 179; CX 9 at 3. All of Claimant's treating physicians diagnosed such symptoms in Claimant as post-concussive syndrome, noting Claimant's report of ongoing vertigo, difficulties functioning, memory loss, anxiety, and depression. CX 9 at 1-3. Claimant was prescribed Elavil, an anti-depressant medication for anxiety, depression, and sleeplessness. *Id.* at 1-2; TR at 132. He was also told to take Ibuprofen to relieve his headaches and other tension. CX 9 at 1; TR at 132.

Claimant testified that his chronic symptoms have prevented him from returning to work in his previous occupation. TR 45-46. Claimant obtained a paper route position ("Carrier") with the Houston Chronicle in 2006 but was unable to maintain the position. *Id*. 82-83. Claimant reported he was unable to maintain the newspaper route because he could not properly process the tasks of driving, the customer's correct addresses, and tossing the newspaper. EX 9 at 40. Claimant reported the Carrier is fined for every newspaper improperly delivered and was fined

so often he was unable to make any money. TR at 82-83; EX 9 at 40. By mutual agreement, Claimant left the position. *Id.*

Claimant subsequently secured a job at the United States Deputy Sheriff Association in Houston, Texas as a Telemarketer, starting on September 13, 2006. *Id*. 83-84. He initially was paid $11.00 per hour and it was then increased to $11.75 per hour for 37 hours per week. *Id.* at 84, 92; CX 18 at 1-3. Claimant continued to maintain this position and rate of pay up until around the time of the hearing. TR at 84. At that point, the type of compensation for Claimant's Telemarketer position was apparently changing from wages to a commission, but he expected to earn approximately the same income, or possibly a bit higher. *Id*. at 84, 92-93.

Summary of Independent Medical Examinations

An Independent Medical Examination ("IME") completed on November 15, 2006 by neurologist Steven Inbody, M.D was submitted by Claimant. CX 19. Employer submitted into evidence a report from an IME completed on March 24, 2006 by neurologist Martin Steiner, M.D. EX 7. Employer also submitted a medical report prepared by Dr. Patricia Sparks, an occupational health expert in toxicology, as well as her deposition. EX 6 at 1-18; EX 12. Dr. Steiner was the only physician who testified at the hearing.

Dr. Steven Inbody

Dr. Inbody is a board-certified neurologist practicing in Houston, Texas. CX 20 at 1. Dr. Inbody's medical license is on probation but the medical board stayed suspension of his medical license and authorized him to practice medicine. EX 11 at 2, 4. He has extensive expertise as a neurologist as reflected in his *curriculum vitae*. CX 20 at 1-6.

Dr. Inbody examined Claimant on November 15, 2006, and found him to be suffering from "clear short-term memory difficulties, attention and concentration problems, but without obvious gross aphasic difficulty." CX 19 at 1, 3. Dr. Inbody conducted a series of neurological functioning tests and made a preliminary diagnosis of post-concussive syndrome with a possible labyrinth (inner-ear) injury. *Id.* at 3. He noted the CT scan apparently showed no specific injury other than possibly a fusiform aneurysm that has yet to be further evaluated. *Id.* at 2.

Based on his preliminary examination, Dr. Inbody found the chemical exposure less significant than the head trauma. *Id*. at 3-4. He stated that the inhalation injury was the possible cause of Claimant's "flu-like" symptoms and lowered platelet levels. *Id*. at 3. He identified head trauma from the chainfall accident as the likely source of Claimant's chronic symptoms of headaches, mood swings, cognitive difficulties, vertigo, and difficulties hearing in one ear. *Id*. at 3. Dr. Inbody reported that additional tests were necessary to determine the extent of the injury and complete a diagnosis. *Id.* at 4-5. He recommended "neuropsch tests to further quantify" the short-term memory changes, mood changes, and cognitive deficits and recommended that patient's inner ear be evaluated with ENG and audiometry tests. *Id*. at 4. He also recommended Claimant begin a trial of Lexapro to "improve the depression," and change from Elavil to Pamelor to "help in the mood stabilization and any affective syndrome complicating cognitive

difficulties." *Id*. at 4. Dr. Inbody opined that Claimant could have some permanent disability once he has attained maximum medical improvement. *Id*. at 4.

Dr. Inbody noted that Claimant's work restrictions are "significant." *Id*. at 5. Dr. Inbody noted that Claimant is primarily limited by the "cognitive and non-cognitive affective symptoms...severe vertiginous symptoms and inner ear difficulties." *Id.* Dr. Inbody would restrict Claimant to sedentary activity requiring only "limited cognitive functioning." *Id.* He did not further define "limited cognitive functioning." *Id.*

Dr. Martin Steiner

Claimant was seen for a medical evaluation by Dr. Steiner, a board-certified neurologist, on March 24, 2006. EX 7 at 27. Dr. Steiner noted that Claimant reported experiencing positional vertigo (occurring with movement or changing positions), unsteadiness, memory loss, decreased libido, impaired hearing, and periodic sweating. EX 7 at 27. Dr. Steiner performed a mini-mental status examination, from which he concluded Claimant's memory is "essentially normal." TR at 146-47; EX 7 at 28. Dr. Steiner conducted a series of basic neurological tests, including a test for vertigo, and found no objective evidence of vertigo or other neurological problems at that moment. TR at 146-147; EX 7 at 28.

Commenting on Claimant's report of ongoing symptoms, Dr. Steiner testified that he believes that symptoms persist for patients when an injury is caused by "conditions out of their control." *Id*. at 184-186. He further opined that symptoms from injuries occurring in a department store persist longer than those resulting from injuries experienced at home. *Id*. He suggested Claimant's ongoing reports of subjective symptoms might be motivated by "happiness or unhappiness with the workplace," "a false sense of feeling ill," or "secondary gain." *Id*. at 185-186. Dr. Steiner further opined that Claimant's subjective report of symptoms might also be explained by circumstances where "doctors keep saying, well, we need to do more testing, I think that there's a problem, so some of it is promoted by physicians." *Id*.

Dr. Steiner opined there was no evidence of "objective neurological abnormality" and recommended Claimant could return to full-duty work. EX 7 at 27-29. Dr. Steiner testified that the tests he conducted are the type that support the existence of a significant injury or concussion, and given he found no such objective evidence, as well as the fact Claimant did not seek emergency treatment after his alleged injuries, he concluded Claimant experienced only a minor injury at most. TR at 150, 174, 185. Dr. Steiner emphasized that he would not expect there to be any post-concussive syndrome a year after the chainfall accident but conceded on cross-examination that ongoing memory and vertigo problems could have been caused by a blow to Claimant's head at his right temple. *Id*. at 161, 182-84. He emphasized, however, that even if there were a concussion, he would not expect it to lead to long-term problems. *Id*. at 151. He referred to an American Medical Association study finding that college football players who suffer from concussions will return to their normal activities within a week. *Id.*

Dr. Steiner noted that Claimant's CT scan results showing a possible fusiform aneurysm were inconclusive because a CT scan is an inappropriate test for this type of problem, noting the test of choice would be an MRA or a cerebral arteriogram, with the MRA being the test that

imposes fewer health risks. EX 7 at 7. He opined that a fusiform aneurysm would not be caused by either the alleged toxic paint exposure or the chainfall accident, but he did not expand on this statement or opine whether either alleged injury could aggravate or otherwise impact such a condition. TR at 149; EX 7 at 7. In his testimony, he referred to Claimant's CT scan as a "negative" CT scan and stated that it is unclear from the CT scan that the fusiform aneurysm even exists. TR at 149, 185.

As for the alleged paint exposure injury, Dr. Steiner found the chemical exposure from the paint accident to be insignificant. EX 7 at 29; TR at 156. He testified that "there was no neurologic abnormality present, so, as far as I was concerned, whatever exposure he had was a transient event." TR at 156. Dr. Steiner opined that no additional tests of Claimant's condition were necessary. *Id*. at 185.

Dr. Patricia Sparks

Dr. Patricia Sparks is a board-certified physician who has practiced occupational and environmental medicine for 30 years. EX 6 at 18-26. She specializes in the evaluation and treatment of individuals who suffer from workplace or environmental exposure. *Id*. at 18-26. She reviewed Claimant's medical records and case history on February 15, 2006. *Id.* at 13. Based on this record, she found that Claimant was briefly exposed to "a paint containing organic solvents and pigments capable of causing acute and chronic skin irritation. *Id*. at 16. Some of the organic solvent may have been absorbed through the skin, although the surface area covered was not large and exposure was relatively brief." *Id*. She noted that toxicity depends on the "nature of the chemical, the amount of exposure, the duration, and the route of absorption." *Id*. She found it unlikely that the brief and limited paint exposure that Claimant experienced would have any impact on his health. EX 12 at 10-11. She further noted "the fact that an agent may be capable of producing an effect does not mean that any contact at all with the chemical would produce the effect." EX 6 at 16. She also found it significant that there were no "acute neurological symptoms suggesting intoxication by either the skin or respiratory route." *Id.* Considering the absence of these initial symptoms, she found it more probable than not that Claimant's subsequent headaches, dizziness and fatigue were caused by some other event or disease and not by the toxic exposure. *Id*.; EX 12 at 10-11. Specifically, she stated that the ongoing symptoms are more likely caused by sinusitis or the chainfall accident, and opined that the sinusitis was the most likely cause. EX 6 at 16-17; EX 12 at 17, 31. As for Claimant's lowered platelet count, she stated that the specific solvents in "Interlac 2 Haze Gray" paint are not "associated with any hematological effect, such as low platelets." CX 12 at 12. She recommended no follow-up diagnostic testing or further treatment for the paint exposure. EX 6 at 17.

Dr. Sparks testified that Claimant's symptoms "can occur following a head injury that appears to be relatively minor." EX 12 at 37. She suggested that post-concussive symptoms associated with minor head trauma usually resolve on their own within 6 months. *Id*. at 39. In her report, she recommended that a neurologist perform an Independent Medical Examination to rule out any complications resulting from the head trauma. EX 6 at 17. She also stated that if Claimant suffers from any dizziness or vertigo, regardless of the cause, he should not work at heights and should be limited to "light to medium" work. *Id.* at 16-17.

Employer's Labor Market Surveys

Two separate labor market surveys were performed in early November 2006 by Thomas Owen of Genex Services in Houston, Texas. EX 9 at 38, 42. Both surveys assessed the availability of positions in the Houston area in November of 2006. *Id.* at 39. Mr. Owens was informed by Employer on October 20, 2006 that Claimant "had a full-duty release, via an Independent Medical Examination (IME) and was released to return to work at the light level with restrictions, via the claimant's treating physician." *Id.* at 37. Mr. Owens did not state in his report any more details concerning those restrictions. *See id.*, generally.

Mr. Owens interviewed Claimant on November 8, 2006 and documented Claimant's report of some of his disabilities, including problems with his memory and balance. *Id.* at 39-40. In gathering Claimant's vocational history, Mr. Owens noted that after Claimant left his usual employment, he attempted to deliver papers for the Houston Chronicle but was unable to perform the functions of the job. *Id.* at 40. He noted Claimant was unable to maintain the newspaper route, "due to his brain's inability to process the driving, customer's correct addresses, and tossing the newspaper at the same time. The claimant reported the carrier is fined for every newspaper that is improperly delivered." *Id.* Mr. Owens also noted that "it was a mutual agreement that the claimant was unable to perform his duties and the job ended." *Id.*

Mr. Owens did not state in his report what Claimant's restrictions are beyond noting a light-duty restriction as reported to Mr. Owens by Employer. *Id.* at 37. It is not clear that Mr. Owens received or reviewed Claimant's medical records. *See id.*, generally. Mr. Owens' report includes a detailed log of activity noting all correspondence, meetings and phone calls. *Id.* at 37-39. On October 20, 2006, Mr. Owens noted in the log that he was told he would receive medical records and that Claimant had signed a release for the records. *Id.* at 37. Yet by October 24, 2006, Mr. Owens researched jobs for the survey with no indication that he had received medical records. *Id.* at 38. The sections in the labor market survey titled "Current Medical Status" and "Past Medical History" both include notes from Mr. Owens' interview with Claimant, but do not mention symptoms other than possible hearing loss. *Id.* The notes state Claimant has little access to medical care. *Id.* A section called "Treatment Plan" addressed medical issues but merely notes Claimant's own report of what medications he is taking and notes Claimant could not remember the name or dosage of the medications which were prescribed by "different doctors" at a "free clinic in Galvenston, TX" for sleep, anxiety, and headaches. *Id.* at 40.

Mr. Owens conducted two surveys, one of which identified 14 jobs based on some restrictions. *Id.* at 46-49. The survey is titled "JOB LEADS - DR. BUCHANAN - with RESTRICTIONS" with no other indication of whether Dr. Buchanan or any physician provided restrictions and/or reviewed the list of jobs. *Id.* at 46. This survey identified 14 jobs but did not specify what the restrictions were beyond "sedentary" or "sedentary - if not have to lift more than 10 pounds." *Id.* at 46-49. The hourly wages for twelve of the positions ranged from $6.00 to $15.00 per hour (or the equivalent thereof in monthly salary) and two positions did not list wages. *Id.* This survey included the following positions: Sales, Collections, Telemarketer, Telephone Surveyor, Cashier, Front Desk Agent, and Driver. *Id.*

The other survey produced assumes Claimant has no limitations. *Id.* at 43-45. The survey is titled, "JOB LEADS - DR. STEINER - NO RESTRICTIONS". *Id.* This survey identified 12 jobs (5 of which did not state any wages) ranging from $10.00 to $20.00 per hour. These positions included Electrical/Mechanical Technician and Assembler, Mechanical Assembler, Assembly Technician, Warehouseman, and Driver (bus, van and shuttle driving positions). *Id.*

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir.1982). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witness. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997).

Causation

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is causally related to his employment. 33 U.S.C. §920(a); *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and the harm but must present some evidence that tends to establish that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which caused or could have caused the harm or pain. *Am. Stevedoring*, 248 F.3d at 64-65; *Brown v. I.T.T./Cont'l Baking Co*., 921 F.2d 289, 296 n.6 (D.C. Cir. 1990); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998). A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (BRB February 3, 1981), aff'd sub nom. *Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984(CRT) (5th Cir. 1982). The sequence of events surrounding an injury can in some cases provide a much better understanding of a case than the medical evidence. *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Claimant presents evidence sufficient to meet his *prima facie* burden. The two accidents in question occurred within days of each other, and both the chainfall accident and the alleged exposure to toxic paint occurred while Claimant was working for Employer. TR 49-51, 58-60. After these two incidents, Claimant reported symptoms of vertigo, pain, headaches, altered smell

and taste, confusional states, depression and mood swings, diminished weight and strength, short-term memory loss, difficulties with concentration and attention, right ear tinnitus, and diminished hearing in his right ear. TR 58-68, 65-66, 76; CX 8 at 4, 8; CX 9 at 1-3, CX 19 at 2-4; EX 7 at 27; EX 19 at 2. I find that Claimant's report of symptoms, along with the temporal proximity of Claimant's symptoms to the workplace incidents, provide adequate evidence to invoke the presumption of causation as to both the chainfall accident and the alleged exposure to paint.

Employer emphasizes that there is no documented, objective evidence of a neurological abnormality and that the only evidence of neurological problems is Claimant's report of his symptoms. However, credible subjective complaints are sufficient to establish a *prima facie* case. *Sylvester*, 14 BRBS at 236. I find no basis for discounting Claimant's report of symptoms notwithstanding Dr. Steiner's testimony to the contrary. TR at 185-86. Dr. Steiner alluded to the possibility of secondary gain without providing any evidence of this. *See id.* at 141-186; *see also* EX 7, generally. Dr. Steiner opined that Claimant's subjective report of symptoms is likely explained by secondary gain and circumstances where "doctors keep saying, well, we need to do more testing, I think that there's a problem, so some of it is promoted by physicians." TR at 185-86. But I find that the contrast between the subjective report of symptoms and the dearth of objective medical evidence is more likely than not reflective of the lack of medical care Claimant has received, due to the lack of private health care coverage as well as Employer's refusal to provide coverage for Claimant's alleged injuries.

Claimant provides credible and consistent reports of his symptoms. Again, this is adequate to invoke the causal nexus. *See Sylvester*, 14 BRBS at 236. Moreover, Dr. Buchanan, Dr. Inbody, as well as the providers Claimant saw at St. Vincent's Clinic, all attributed Claimant's symptoms to one or both of Claimant's workplace injuries. CX 7 at 3; CX 9 at 1-3; CX 19 at 3. I therefore conclude that Claimant has presented more than enough evidence to meet his *prima facie* burden in his report of injuries following the two accidents (chainfall and paint exposure) and thus Claimant invokes the Section 20(a) presumption.

An employer may rebut the Section 20(a) presumption with substantive evidence that severs the presumed causal connection between the injury and Claimant's employment. *Am. Stevedoring Ltd.*, 248 F.3d at 65. An employer may do so with "specific and comprehensive" evidence sufficient to sever the connection between the injury and the employment in which case the presumption falls away and causation is addressed considering the evidence as a whole. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In that event, all relevant evidence is weighed to determine if a causal relationship has been established, with the claimant bearing the ultimate burden of persuasion by a preponderance of the evidence. *Id.*; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 28 BRBS 43(CRT) (1994).

I find that Employer has met its burden of providing substantial evidence to break the causal nexus between Claimant's injury and the alleged toxic paint exposure for the following reasons. Dr. Sparks testified that both the circumstances of Claimant's exposure and the absence of acute symptoms immediately following the accident indicate that his exposure was minimal and unlikely to cause any long-term health impacts. EX 12 at 10-11; EX 6 at 16. I conclude that

this evidence breaks the causal nexus between Claimant's paint exposure and Claimant's report of symptoms.

Similarly, I find that the testimony of neurologist Dr. Steiner provides substantial evidence that the chronic symptoms experienced by Claimant were unlikely to have resulted from the chainfall accident. TR at 151. He testified that the incident was not likely to result in the chronic symptoms described by Claimant. *Id*. at 150, 174, 185. He opined that Claimant's delay in obtaining treatment indicated it was not a serious injury, as significant head trauma capable of causing long-term harm usually requires immediate medical attention. *Id*. I find that this evidence provides substantial evidence to break the causal nexus between the chainfall accident and Claimant's report of symptoms.

Accordingly, I conclude that issues of causation concerning the chainfall accident as well as the paint exposure must be resolved based upon the evidence as a whole.

Evidence as a Whole - Paint Exposure

Employer argues that 1) Claimant was not actually exposed to toxic paint, and 2) alternatively, even if he were exposed to the paint, he was not actually injured. If the evidence as a whole supports either of these arguments, then Claimant's injuries are not related to the paint exposure.

In support of its assertion that Claimant was not exposed to toxic paint, Employer produced a series of affidavits from the Painting Supervisor of the worksite, Peter Judt. EX 10, EX 13. Employer asserts that these affidavits demonstrate that Claimant was not exposed to the toxic paint. The first affidavit, admitted at the hearing, states that the paint was not in use during the month of November 2005. EX 10 at 2. Two other affidavits, submitted without notarization on January 11, 2007, were then submitted as notarized originals on March 7, 2007. EX 13 at 1-4. Claimant objects to the admission of these affidavits because although Claimant wanted to depose Mr. Judt, Claimant argues he was not given the opportunity to do so. Employer responds that it made good faith attempts to arrange the deposition up to and including the date that Claimant submitted a motion to strike the affidavits on March 1, 2007.

Given that Claimant refused Employer's attempts to arrange the deposition, I admit the affadivits in question (EX 13) over Claimant's objection. However, for the following reasons, the content of the affidavits and the circumstances surrounding their production lead me to conclude that Mr. Judt's statements in all of the affidavits are of little evidentiary value. First, and most importantly, Mr. Judt was never deposed. Absent this test of his credibility, the probative value of the affidavits is quite limited. Additionally, the affidavits appear to have been narrowly crafted. EX 10, EX 13. For example, the affidavit that claims the "Interlac 2 Haze Gray" paint was not in use on certain dates leaves open the possibility that the paint was in use at Todd Shipyards on October 31, 2005 (*id.* at 1-2), and, in turn, the other affidavit submitted post-trial denies the painting of "dry dock 10" between October 28, 2005 and November 8, 2005 but implicitly leaves open other possibilities. *Id.* at 3. For example, the affidavits together leave open the possibility that the alleged paint exposure could have occurred on October 31, 2005, on

another ship than "dry dock 10."[2] *See id.* at 1-4. Finally, I find it odd, and possibly suspicious, that Employer submitted unsigned affidavits at all, and then submitted those same affidavits, notarized, two months later. All of these concerns lead me to conclude that the affidavits are lacking in probative value concerning whether Claimant was exposed to toxic paint sometime between October 28, 2005 and November 8, 2005.

Despite Employer's inferences to the contrary, Claimant's testimony regarding the paint exposure is credible, and I give it more weight than the affidavit produced by Employer. Claimant testified on the circumstances of the exposure thoroughly, including those circumstances that mitigate the significance of the exposure. *Id*. at 49-54. Even though Claimant does not remember the exact date of the exposure, a witness need not remember every date and fact to be a credible witness. Supporting Claimant's testimony regarding the incident is the MSDS Claimant obtained from Todd Shipyards. TR at 70-71; CX 12. It was produced by Todd's Painting Supervisor in 2005 based on Claimant's recollection of the accident less than a month after it occurred. TR at 68-69. Claimant reported that the incident happened while working on the ship called "Dry Dock 10" and then obtained the MSDS for "Interlac 2 Haze Gray." *Id.* The fact the painting supervisor produced this MSDS form at that time, based on Todd Shipyard records, carries at least as much weight as the records cited in Peter Judt's affidavits produced in 2007, over a year after the initial exposure.

Employer attempts also to cast doubt on Claimant's credibility by questioning the circumstances of his communications with Dr. Buchanan regarding the paint exposure injury. Specifically, Employer argues that Claimant should have notified Dr. Buchanan of the paint exposure during his first examination but made no mention of it until his appointment on November 28, 2005. CX 8 at 4; TR at 68. Employer also emphasizes that Dr. Buchanan checked off a check box in his medical notes for the November 21, 2005 appointment that stated he found no chemical exposure, arguing that this suggests Claimant somehow changed his story concerning the cause of his symptoms between November 21, 2005 and November 28, 2005.

I find Employer's analysis of these records is faulty. Inconsistencies in Dr. Buchanan's medical records may be an issue of documentation rather than evidence that Claimant's testimony is unreliable. Dr. Buchanan may not have heard all of what Claimant stated in terms of his workplace injuries or simply noted that no toxic substances were involved with the chainfall accident for which Claimant initially sought treatment. Alternatively, Claimant, more concerned about his head trauma, may not have initially told Dr. Buchanan about the paint exposure. Such an oversight seems natural and does not imply Claimant was disingenuous about his exposure to potentially toxic paint; in fact, he may initially have not fully appreciated the degree of risk involved in being exposed to paint in the workplace. Claimant has repeatedly reported that he suffered cognitive problems, which also could explain difficulties in self-reporting, either in appreciating the risk or remembering to tell Dr. Buchanan about the paint incident. Moreover, I find no other concerns or significant discrepancies in Claimant's testimony, and so I conclude Claimant's testimony regarding his exposure is credible and

[2] It also leave open the possibility that Mr. Judt is not referring to the ship "Dry Dock 10" but rather is referring to a dry dock or other location called "dry dock 10"; if so, Mr. Judt may be craftily denying an actual dry dock was not painted on the dates in question, while evading the matter of whether Claimant was involved in painting a ship during that time period.

therefore outweighs the arguments and evidence produced by Employer. Thus I find that the evidence produced by both parties suggests that Claimant was briefly exposed to Interlac 2 Haze Gray Paint sometime between October 28 and November 7, 2005.

However, for the following reasons, I also find that the evidence as a whole indicates Claimant's workplace exposure to paint did not cause his injuries. Employer's toxicology expert, Dr. Sparks, a leading academic with extensive experience evaluating patients exposed to workplace toxins, provided convincing testimony that Claimant's injuries are unrelated to the toxic paint exposure. EX 6 at 18-26; EX 12. I find Dr. Sparks' report is authoritative, and find her evaluation of the long-term effects associated with the degree of Claimant's exposure is credible. I accord it significant weight due to her expertise.

Claimant's counsel fails to present a valid reason to disregard or attribute less weight to Dr. Sparks' medical testimony. Claimant's counsel argues that Dr. Sparks' credibility is compromised by her work testifying on behalf of defendants and compensation carriers, but I find no evidence supports such bias. *Id*. Claimant's counsel emphasizes that Dr. Sparks did not evaluate Claimant and argues that therefore her opinion should be accorded less weight. However, I find that the nature of Dr. Sparks' expertise, and her testimony, relates to the facts of Claimant's paint exposure, not to Claimant's symptoms. Specifically, Dr. Sparks' testimony pertains to organic solvents, their toxicity and the likelihood of harm resulting from Claimant's reported exposure. EX 6, EX 12. Given the nature of her opinion, I find that there was no need for her to evaluate Claimant.

Dr. Sparks reviewed Claimant's medical records and case history on February 15, 2006. *Id.* at 13. Based on her review and her expertise, she opined that the "Interlac 2 Haze Gray" paint, "a paint containing organic solvents and pigments capable of causing acute and chronic skin irritation" may have been absorbed through Claimant's skin, but the surface area covered was not large and the exposure was brief. *Id*. at 16; EX 12 at 10-11. Therefore, she concluded that it is unlikely that the kind of paint exposure Claimant that experienced would have any impact on his health. EX 6 at 16; EX 12 at 10-11. Significantly, Dr. Sparks noted that there were no "acute neurological symptoms suggesting intoxication by either the skin or respiratory route." EX 6 at 16. Considering the absence of these initial symptoms, she found it more probable than not that his subsequent headaches, dizziness and fatigue were caused by either sinusitis or the chainfall injury. *Id.* at 16-17; EX 12 at 10-11. Moreover, the MSDS itself notes that only "repeated and prolonged occupational overexposure" is noted to cause permanent neurological damage, whereas Claimant's exposure was quite brief. EX 12 at 5, 7. Therefore, I conclude that Dr. Sparks' opinion, along with the MSDS, provide more than adequate evidence that Claimant's workplace exposure to paint did not cause his injuries.

Claimant's witness, Dr. Inbody, attributes only Claimant's flu-like symptoms and his low blood platelet count, called thrombocytopenia in the report, to the inhalation injury. CX 19 at 3. He believes Claimant's chronic symptoms, including his cognitive difficulties and affective disorder, stem from the post-concussive syndrome. *Id*. at 4.

Dr. Steiner agrees with Dr. Sparks' opinion as well, but I accord little weight to his opinion because he arrived at it via a brief one-time evaluation in which he found no objective

neurological signs of injury. EX 7 at 29; TR at 171. He provided no scientific justification for why a doctor should ignore a patient's subjective symptoms when evaluating whether an injury exists; he also provided little basis for opining Claimant does not suffer from ongoing vertigo. Dr. Steiner merely concluded this from a test that determined Claimant happened to experience no signs of vertigo in the moment of testing. And, unlike Dr. Sparks, Dr. Steiner offers no evidence regarding the events surrounding the exposure to justify his conclusions regarding its medical effect on Claimant.

I find Dr. Buchanan's medical opinion, the only opinion attributing Claimant's symptoms to the chemical exposure, lacks a convincing medical basis. CX 8 at 3. Dr. Buchanan found the thrombocytopenia was caused by the paint exposure and attributed all of Claimant's symptoms to that exposure. *Id*. Dr. Buchanan based his opinion largely on the MSDS provided by Claimant as well as Claimant's examination and medical history. *Id.* Dr. Sparks based her opinion largely on the MSDS as well as Claimant's medical records and the facts surrounding the exposure. Although Dr. Buchanan stated that he believed the thrombocytopenia was caused by the paint exposure, I accord more weight to Dr. Sparks' expertise and her opinion that the particular toxic substance in the paint does not affect blood platelet counts. EX 12 at 12.[3] I therefore accord little weight to his medical opinion regarding the possible toxic effects of the paint. In addition, the document in evidence, the MSDS sheet detailing the content of the paint, also supports Dr. Sparks' testimony as it does not list thrombocytopenia as a possible symptom of exposure. CX 12 at 5, 7.

After weighing all of the evidence, I find that Claimant's paint exposure did not cause his injuries. Therefore, I conclude that the evidence as a whole indicates that although Claimant was exposed to toxic paint, his exposure was too brief and limited to cause his symptoms.

Evidence as a Whole - Head Injury

I find that the weight of medical evidence suggests that Claimant continues to suffer injuries resulting from the chainfall accident. All of Claimant's treating physicians identified him as suffering from post-concussive syndrome. CX 8 at 8; CX 9 at 1-3; CX 19 at 3-4. In fact, Dr. Sparks also recognized post-concussive syndrome as the likely cause of his symptoms if the symptoms do not all originate in Claimant's chronic sinus problems. EX 6 at 17; EX 12 at 39. As to whether Claimant's persistent symptoms are definitely caused by post-concussive syndrome, she deferred to the opinion of a treating neurologist. *Id.* at 18.

I find neurologist Dr. Inbody's level of expertise to be impressive and find his report on Claimant's medical condition both thorough and credible. CX 19; CX 20. He diagnosed Claimant's condition as post-concussive syndrome and a labyrinth injury stemming from the chainfall accident. CX 20 at 3. He also found that claimant's affective disorder is possibly related to his head trauma. *Id.* at 4. Though Dr. Inbody's evaluation was limited, he recognized that Claimant's subjective symptoms should not be ignored. *Id*. Because he does not discount Claimant's symptoms in arriving at a diagnosis, I grant greater weight to his medical opinion than to Dr. Steiner, who discounts Claimant's subjective reports. Dr. Steiner's concerns

[3] While Dr. Sparks is an expert in workplace exposure, no evidence indicates Dr. Buchanan has this kind of expertise. TR at 67; CX 8 at 1-11; EX 6 at 18-26.

regarding Dr. Inbody's methods and procedures do not diminish the weight of Dr. Inbody's report. Nearly all of Dr. Steiner's criticisms of Dr. Inbody's examination and findings are related to Dr. Inbody's disagreement with Dr. Steiner's own findings, and to Dr. Inbody's emphasis on Claimant's complaints not having been supported by the tests he utilized for his examination of Claimant.[4] TR 143-144, 161. Dr. Steiner discounted Claimant's subjective symptoms because a 45-minute evaluation failed to provide evidence of neurological harm; however, the tests used by Dr. Steiner to test Claimant's functioning did so at the moment of evaluation and so could not definitively rule out neurological injuries. TR at 171; EX 7 at 28-29. Thus I find that Dr. Steiner offers no convincing basis and cites no evidence for discounting Claimant's subjective report of symptoms. The difference in Dr. Steiner and Dr. Inbody's medical opinions has more to do with the level of trust they place in Claimant than with any fault or failure in Dr. Inbody's medical examination.[5]

Not only does Dr. Inbody's report suggest Claimant needs additional tests to identify the full extent of his injuries and develop a proper medical prognosis (CX 19 at 3-4), but even Dr. Steiner's own testimony makes clear that additional tests such as an ENG are sometimes warranted based solely on subjective complaints. TR at 162. And, for reasons discussed above, Dr. Steiner has failed to adequately explain why those tests would not be warranted. Employer has refused to provide medical coverage, including adequate diagnostic testing, and now argues that Claimant has no injuries based on the dearth of objective medical evidence. I am unconvinced.

Equally unconvincing is Employer's attempt to tie Claimant's symptoms to the ending of a personal relationship. Employer fails to produce any evidence on how this relationship might result in Claimant's chronic symptoms. Without additional evidence or a clearer statement of how Claimant's personal life impacts the issues in this case, this argument is unpersuasive. Similarly, Dr. Steiner's testimony that Claimant could be engaging in malingering or symptom exaggeration, absent any evidence in support of this possibility, does not lead to the conclusion that Claimant's report of symptoms lacks credibility. *See* TR at 141-186; *see also* EX 7, generally.

The preponderance of the medical record suggests that Claimant was injured by a chainfall in a work related accident and continues to suffer from post-concussive syndrome and/or a damaged labyrinth resulting from his head injury. I therefore conclude that Claimant's symptoms are due to injuries caused by his work-related chainfall accident.

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[4] Dr. Steiner also bases his opinion regarding post-concussive syndrome on an AMA study on collegiate football players who suffer concussions. TR at 151-152. He offers this study to emphasize that concussions usually should resolve themselves within a week. *Id.* I find the comparison between athletic injuries to the injuries suffered by Claimant, who was hit on his right temple with a 4- or 5-ton chainfall, to be irrelevant because it is unclear whether these athletic injuries are even comparable in nature to Claimant's injury. Moreover, every other physician who examined claimant or reviewed his medical record either found he suffered from ongoing post-concussive syndrome or admitted it was possible and either encouraged additional medical evaluation or deferred to neurological experts. CX 9 at 1-3; CX 19 at 1-3; EX 6 at 16; EX 12 at 18

[5] Employer also infers that Dr. Inbody's medical license probation limits the credibility of his findings. EX 11. However, the medical board made the decision to stay Dr. Inbody's medical license suspension and authorized him to practice medicine. *Id.* at 2, 4. I conclude that the probation condition on Dr. Inbody's license does not reflect poorly on his ability to render expert medical opinions.

Nature and Extent of Disability

Claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (BRB November 21, 1985). An injured worker's disability becomes permanent when the injury or condition reaches the point of maximum medical improvement ("MMI"). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). Conversely, any disability shown prior to the point of MMI is considered temporary in nature. *Id.* The medical evidence in support of MMI must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60.

Employer asserts that Claimant reached MMI when Dr. Buchanan released him for work on November 21, 2005. Claimant's counsel argues that Claimant has yet to reach MMI and that additional testing is necessary to establish an accurate prognosis. Claimant's counsel references Dr. Inbody's report that Claimant condition may improve with treatment.

I find that the evidence does not support a conclusion that Claimant has reached MMI. I accord little weight to Dr. Buchanan's original release of Claimant to return to work on November 21, 2005 because Dr. Buchanan later rescinded this release and set constraints on Claimant's return. EX 5 at 11; CX 8 at 1, 3, 10. Dr. Inbody's evaluation of Claimant's condition in November 2006 is the most current medical opinion and, therefore, the most relevant to Claimant's current condition. CX 19. I accord it more weight than the opinion offered by Dr. Steiner given that Dr. Steiner discounted Claimant's subjective symptoms on the basis of only the most rudimentary "bed side" tests. EX 7 at 27-29. Moreover, Employer's continued denial of benefits has likely delayed the diagnosis and treatment of Claimant's condition. I conclude that Claimant's injuries due to the chainfall accident have not reached MMI and that therefore Claimant's disability remains temporary in nature.

Concerning extent of disability, if the claimant establishes that he is unable to perform his usual employment because of a work-related injury, he is presumed totally disabled. *Manigault v. Stevens Shipping Co*., 22 BRBS 332, 333 (1989). At that point, the burden shifts to the employer to prove the availability of suitable alternate employment. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). Such employment must consist of realistic job opportunities that a claimant is capable of performing and could secure with diligence. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981). Determination of a claimant's capabilities must be based not only on physical condition but also on other factors, including age, education, background, intellectual and physical capacities, employment history and experience, rehabilitative potential, and the availability of work that the claimant can do. *See Turner*, 661 F.2d at 1042*; Odom Consrt. Co., Inc. v. U.S. Dep't. of Labor*, 622 F.2d 110, 115 (5th Cir. 1980). The two-fold test for determining whether a job constitutes suitable alternative employment is whether the job falls within the range of claimant's capabilities and whether the job is reasonably available such that Claimant could realistically and likely secure it. *Turner*, 661 F.2d at 1042-43.

For the following reasons, I find that Claimant has established that he is unable to perform his usual employment due to his work related injuries. His ability to work is restricted due to injuries related to the head trauma caused by the chainfall accident. Dr. Buchanan documented Claimant's vertigo and cognitive problems, and placed restrictions on Claimant's return to work. CX 8 at 1. Dr. Buchanan restricted Claimant to a limited amount of bending, stooping and lifting, and restricted him from all overhead work. *Id*. During cross-examination, Dr. Sparks agreed that Claimant should not work at heights if he is experiencing vertigo. EX 6 at 16-17. Dr. Inbody recommended Claimant's work be restricted to sedentary activity. CX 19 at 5. Claimant reports vertigo and cognitive difficulties including short-term memory problems and difficulties concentrating.

According to Claimant, his work with Todd Shipyards was frequently done at heights. TR at 41-45. He often climbed up on platforms or to the top of ships that were twenty stories tall. *Id*. The job also involved moving heavy objects, including bulkhead metal sheeting and engines, which required the use of heavy chainfalls weighing up to 500 pounds. *Id*. at 41-42. This work is dangerous and not appropriate for someone prone to vertigo or cognitive difficulties that might place him or others at risk of significant harm. Claimant's injury therefore precludes his return to his usual employment. Unable to perform his usual work, Claimant is considered totally disabled unless suitable alternative employment is identified by Employer. *See Trask,* 17 BRBS at 59.

Claimant has established that he can work as a Telemarketer, one of the positions listed in Employer's labor market surveys conducted in the Houston, Texas area in November 2006. EX 9 at 47. Claimant's position began on September 13, 2005, at an hourly rate of $11.00 per hour, and at some point he received a raise and now earns $11.75 per hour. TR at 83-84, 92; CX 18 at 1-3. Claimant presently works 37 hours per week. *Id.;* TR at 92-93. Employer appears to be arguing that Claimant is capable of working other, higher-paying positions, and cites as evidence of this claim the jobs listed in the labor market surveys with wages ranging from $6.00 per hour to $20.00 per hour.

Evidence of suitable alternative employment should be based on Claimant's actual capabilities and limitations. *See Turner,* 661 F.2d at 1042. For the following reasons, I find Mr. Owens' labor market surveys fail to provide the exact nature and terms required to determine whether the jobs listed constitute suitable alternative employment for Claimant. *See Thompson v. Lockheed Shipbuilding and Construction Co*., 21 BRBS 94, 97 (1988). Employer submitted two labor market surveys that were conducted by Genex Services on November 10, 2006, after their representative, Thomas Owens, met with Claimant. EX 9 at 38-39, 43-49. Both surveys are too flawed to provide evidence of suitable alternative employment because the surveys offer little information as to how Claimant's restrictions were taken into account in conducting the job survey. *See* EX 9, generally. In fact, it is unclear whether Mr. Owens ever received medical records of Claimant's work restrictions. It seems if he had, the record would reflect that, given his labor market survey report includes a detailed log of all correspondence, meetings, and phone calls pertaining to Claimant. *Id.* 37-39. Although when he first took on the case, Mr. Owens was told Claimant had signed a release for medical records and that Mr. Owens would receive such records soon, there is no indication he received those records. *Id.* at 37. Instead, on October 24, 2006, four days after he learned he would receive medical records, he researched

jobs for the survey without any indication that the medical records had been received. *Id.* at 38. In fact, the content of the report itself suggests that Mr. Owens did not receive any medical records at any point. *Id.* at 39. Under "Current Medical Status" and "Past Medical History" Mr. Owens only includes notes from his interview with Claimant. Those notes do not discuss Claimant's symptoms, other than a report by Claimant of difficulties with hearing. *Id.* A section called "Treatment Plan" addressed only medical issues but merely notes Claimant's own report of what medications he is taking and notes Claimant could not remember the name or dosage of medications prescribed by "different doctors" at a "free clinic in Galvenston, TX" for sleep, anxiety, and headaches. *Id*. at 40. The only other mention of physicians that have assessed Claimant are the titles of the labor market surveys themselves. The first labor market survey, dated November 10, 2006, is titled: "JOB LEADS - DR. STEINER - NO RESTRICTIONS" and it lists jobs with wages ranging from $10.00 to $20.00 dollars per hour. *Id.* at 43-45. The second labor market survey, also dated November 10, 2006, is titled: "JOB LEADS - DR. BUCHANAN - with RESTRICTIONS" and the positions it lists include wages ranging from $6.00 to $15.00 per hour. *Id*. at 46-49. The restrictions that Mr. Owens refers to seem to be those of general light duty, which he noted in his call log Employer reported to him.

Moreover, although Mr. Owens noted Claimant's cognitive difficulties, and that Claimant lost his paper route because of those difficulties, there is no indication Mr. Owens took such problems into account with these surveys. In gathering Claimant's vocational history, Mr. Owens noted that after Claimant left his usual employment, he attempted to deliver papers for the Houston Chronicle but was unable to perform the functions of the job. *Id.* at 40. Claimant reported to Mr. Owens that he was unable to maintain the newspaper route "due to his brain's inability to process the driving, customer's correct addresses, and tossing the newspaper at the same time. The claimant reported the carrier is fined for every newspaper that is improperly delivered." *Id.* Mr. Owens also noted that "it was a mutual agreement that the claimant was unable to perform his duties and the job ended." *Id*. Though Mr. Owens documents these cognitive problems, he does not report whether or how it impacted his analysis of Claimant's job prospects. *See* EX 9, generally.

Therefore, I accord little evidentiary weight to the labor market surveys due to the fact there is no indication that Mr. Owens ever received or reviewed Claimant's medical records, or took into account his vocational history and his report of symptoms. In addition, even if there were indication that Mr. Owens did review medical records and take into consideration Claimant's report of cognitive difficulties with the paper route, I would still find it difficult to believe Claimant would be capable of completing the tasks involved in nearly all of the remaining jobs in the market surveys. These positions include Telephone Interviewer, Sales, Collections, Cashier, Front Desk Agent, Driver, Electrical/Mechanical Technician and Assembler, Mechanical Assembler, Assembly Technician, and Warehouseman. EX 9 at 43-49. With the exception of Telephone Interviewer, which is similar to Claimant's current job of Telemarketing, it is difficult to imagine any of these jobs being less challenging or requiring fewer tasks than that of Paper Route Delivery, a position Claimant was unable to perform. As Dr. Inbody noted, Claimant is limited by his "cognitive and non-cognitive affective symptoms...severe vertiginous symptoms and inner ear difficulties." Id. Dr. Inbody would restrict Claimant to sedentary activity requiring only "limited cognitive functioning." Id.

I therefore conclude that the labor market surveys provide little probative evidence of the work Claimant could have performed at the time.

However, for the following reasons I also find other evidence suggests Claimant could secure and maintain the Telemarketer positions listed in the labor market surveys, and the similar position of Telephone Interviewer, a sedentary position that involves similar cognitive tasks. I find that Claimant's Telemarketer position with United States Deputy Sheriff Association that he started on September 13, 2006 at the salary of $11.00 per hour is comparable to the Telemarketer and Telephone Interviewer positions identified in the second job survey. EX 9 at 46-49; TR at 83-84, 92. I also find that Claimant's ongoing, full-time work at the current salary of $11.75 reflects Claimant is capable of securing and performing a Telemarketer position on an ongoing basis, and that Claimant has been capable of doing so since September 13, 2006 when he did in fact obtain that position. CX 18 at 1-3; TR at 83-84, 92.

Thus, I conclude that the Telemarketer (and Telephone Interviewer) positions listed in the labor market surveys are positions Claimant could have secured and maintained. The labor market surveys were conducted for the Houston labor market in as of November 2006, but I find that Claimant was capable of working in such positions as of September 13, 2006, the date he started working for the United States Deputy Sheriff Association. I therefore find that Claimant was temporarily totally disabled from the date of the chainfall injury, November 8, 2005, through and including September 12, 2006, and has been partially disabled starting September 13, 2006 until the present and continuing.

Wage-Earning Capacity

Section 8(e) of the Act provides that "[i]n case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment." 33 U.S.C. 908(e). Section 8(h) provides that wage-earning capacity will be determined by the Claimant's "actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). Section 8(h) requires the ALJ to apply a two-part test in determining wage-earning capacity. *Id.* The first inquiry requires determining whether actual post-injury wages reasonably and fairly represent the claimant's wage-earning capacity. *Id*. If so, the inquiry ends there. *Id.* However, if actual wages are not representative of the claimant's wage-earning capacity then the administrative law judge must arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. *Id.*; *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649, 660 (1979). The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director,* OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

Employer argues that Claimant's wage-earning capacity should be based on the jobs listed in Employer's market surveys, apparently arguing for the wages higher than the wages Claimant currently receives ($11.75 per hour) and has received ($11.00 per hour upon starting

the position). However, for the reasons discussed above, I find that Claimant's actual wages represent Claimant's wage earning capacity for at least the time being due to his temporary, partial disability. Employer submitted labor market surveys from November 10, 2006, with wages that range from $6.00 to $15.00 per hour for positions restricted to sedentary tasks, and $10.00 to $20.00 per hour with no restrictions. *Id*. at 43-49. It appears Employer may be arguing Claimant is underemployed given this range of wages. After reviewing the evidence, including the medical evidence, vocational evidence, vocational history, and Claimant's current employment, I find that Claimant's actual wage fairly and reasonably represents his current wage-earning capacity. In addition, as discussed above, the labor market surveys fail to take into account Claimant's capabilities and limitations. Thus, even if I had found that Claimant's current position did not reflect his wage-earning capacity, I would also have found that Employer has failed to establish an alternative reasonable wage-earning capacity. *See Grage*, 21 BRBS at 69.

Although Claimant originally earned $11.00 per hour when he started work on September 13, 2006, he concedes that his wage-earning capacity as of September 13, 2006 was $11.75 per hour for 37 hours per week, which is the amount of his wages and hours as of the date he was deposed, and roughly the amount of his wages and hours at the time of the hearing.[6] *See* Claimant's Post-hearing brief at 45. I therefore find that Claimant's wage-earning capacity as of September 13, 2006 is $11.75 per hour for 37 hours per week, or $434.75 per week. The parties have stipulated to an AWW of $851.66, and the difference between Claimant's wage earning capacity and AWW is $416.91. Employer therefore shall compensate Claimant as of September 13, 2006 and continuing at a compensation rate of two-thirds of $416.91, or $277.91 per week.

Adjustment for inflation

When post-injury wages are used to establish wage-earning capacity, the wages earned in the post-injury job must be adjusted to represent the wages which that job paid at the time of the claimant's injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984). The post-injury wages should be adjusted using the percent change in the National Average Weekly Wage ("NAWW"). *Quan v. Marine Power & Equipment Company*, 30 BRBS 124 (1996); *see also* 33 U.S.C. §906(b)(1)-(3). Accordingly, I find that for purposes of calculating wage-earning capacity Claimant's wages should be adjusted accordingly by the District Director via reference to the NAWW.

Interest and Penalties for Non-Payment

A claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Directors OWCP,* 594 F.2d 986 (4th Cir. 1979). Accordingly, interest on the unpaid compensation amounts owed by Employer should be included in the District Director's calculations of amounts due under this decision and order. Interest also should be awarded on past due medical benefits, whether payment is due to a

[6] At the time of the hearing, it appears Claimant's compensation may have been switching to a commission basis, but he testified that he expected to earn approximately the same amount. TR at 92-93.

claimant or to the medical providers. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997). Failure to timely pay medical benefits or compensation awarded will result in penalties under the Act as well.

Attorney's Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including Claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order.

It is therefore **ORDERED:**

1. Employer shall pay temporary total disability from November 8, 2005 until September 13, 2006 at the agreed compensation rate of $567.77 per week.

2. Employer shall pay temporary partial disability at the rate of $277.91 per week from September 13, 2006 until the present and continuing.

3. Pursuant to Section 7 of the Act, Employer shall pay all outstanding medical claims and costs related to Claimant's injuries and shall furnish all future reasonable and necessary medical diagnosis and treatment of the injuries.

4. Employer shall pay interest on Claimant's unpaid compensation benefits from the date compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. section 1961.

5. The District Director shall make all calculations necessary to carry out this Order, including for interest as well as penalties, if applicable.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California